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In The

Supreme Court of the United States

OCTOBER TERM 1970

No. 1-1694 70-197

RAYMOND KELLY,
Petitioner,
vs.
UNION PACIFIC RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT UNION PACIFIC RAILROAD COMPANY

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Oregon dated February 24, 1971, is set forth in the Appendix to the petition.

JURISDICTION

Respondent does not dispute this court's jurisdiction to review the judgment of the Supreme Court of Oregon by writ of certiorari. However, this case does not involve the interpretation of the Federal Employers Liability Act (FELA), 45 USC § 51, et seq.

QUESTION PRESENTED

Respondent does not accept the statement of the Question Presented as set forth by petitioner because the question as stated is a summary of petitioner's argument.

The Question Presented is whether it is error for the Court to instruct the jury in this FELA case that the plaintiff, to recover, must establish his position on the issues by a preponderance of the evidence.

STATEMENT OF THE CASE

In this case petitioner brought an action for damages for injuries sustained while in the employment of respondent. The action was based upon a claim of negligence under the Federal Employers Liability Act (FELA), 45 USC § 51 et seq. Petitioner appealed from a judgment for respondent which was entered pursuant to a jury verdict. Petitioner contended that an instruction given to the jury was erroneous because the burden of persuasion in an FELA case should be something less than a preponderance of the evidence. The Supreme Court of Oregon affirmed the judgment of the trial court.

ARGUMENT

Petitioner's claim is based upon the giving of the italicized portion of the following instruction:

> "Preponderance of the evidence means the greater weight of the evidence, not necessarily the greater volume of the evidence but the more convincing evidence. It may be defined as requiring proof that the facts asserted were more probably true than false. *You are to consider the evidence as though it were being weighed on a scale and if upon*

> *any issue in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs the heavier, you should resolve the issue against the plaintiff upon whom the burden of proof rests. Mere speculation or guesswork will not suffice to prove any issue in this case.* The law does not require demonstration, that is, such a degree of proof as, excluding the possibility error produces absolute certainty because such proof is rarely possible. A preponderance of evidence, as that term has been defined by me, only is required."

Several decisions have held that it is proper in an FELA case to instruct the jury that plaintiff must establish each issue in his case by a preponderance of the evidence. The trial court in *Burch v. Reading Co.*, 240 F2d 574 (3rd Cir 1957), instructed the jury as follows:

> "The plaintiff has the burden of proving to you by the weight or the fair preponderance of the evidence that the defendant or its employees, other than the plaintiff, did not provide her with a reasonably safe place to work and that this negligence caused, in whole or in part, this injury to plaintiff. If, after considering all the evidence, the question of whether or not the defendant or its employees, other than the plaintiff of course, were negligent in failing to use reasonable care to provide plaintiff with a safe place to work is so evenly balanced in your mind that you have no conviction, then you must find for the defendant. It is her burden to convince you that there was this negligence. Also, if the question of whether or not such negligence was a factor in causing the injury is so evenly balanced in your mind that you have no conviction, then you must find for the defendant." (p. 577)

The Court of Appeals for the Third Circuit upheld this instruction as proper. A writ of certiorari was pe-

titioned for, but the Supreme Court refused the request. 353 US 965, 1 L Ed 2d 914, 77 S Ct 1049 (1957).

The Missouri Supreme Court has also upheld an instruction similar to the one being contested. In *Pierce v. New York Central R. Co.*, 257 SW2d 84 (1953), the Court stated:

> "Further, defendant asked and obtained Instruction 6, which advised the jury, 'that the burden is upon the plaintiff to prove by the preponderance of all the evidence in the case, every fact, which, under the instructions of the Court he is required to prove in order to make out his case, * * *.' We find no conflict and no error." (p. 87)

In *Dennis v. Denver & Rio Grande R. Co.*, 375 US 208, 11 L Ed 2d 256, 84 S Ct 291 (1963), a case upon which petitioner strongly relies, this Court overruled the Utah Supreme Court's reversal of a jury verdict for an injured employee in an FELA case. The Court held that where there is any evidence of employer negligence in an FELA case, a jury verdict may not be set aside.

The relevance of the *Dennis* decision to this petition is that the trial court instructed the jury in the following manner:

> "In this connection, you are instructed that if you find from a preponderance of the evidence, that the railroad company failed to exercise reasonable care in that it subjected plaintiff to unreasonable exposure to harm from weather conditions, then you are instructed that defendant was negligent in failing to discharge its duty as hereinabove set forth; * * *." (p. 211)

Petitioner's authorities do not relate to instructions with respect to burden of proof and preponderance of

the evidence but rather to the quantum of evidence necessary to constitute a jury case in a Federal Employers Liability Act action.

Petitioner's contention that the trial court erred in instructing the jury on the burden of proof rests entirely on *Lavender v. Kurn*, 327 US 645, 90 L Ed 916, 66 S Ct 740 (1946) and the line of cases following that decision.

In *Lavender v. Kurn*, supra; *Rogers v. Missouri Pac RR.*, 352 US 500, 1 L Ed 2d 493, 77 S Ct 443 (1957); *Davis v. Baltimore & Ohio RR*, 379 US 671, 13 L Ed 2d 594, 85 S Ct 636 (1965); *Gallick v. Baltimore & Ohio RR*, 372 US 108, 9 L Ed 2d 618, 83 S Ct 659 (1963); *Dennis v. Denver & Rio Grande R. Co.*, 375 US 208, 11 L Ed 256, 84 S Ct 291 (1963); and *Wilkerson v. McCarthy*, 336 US 53, 93 L Ed 497, 69 S Ct 413 (1949), this Court overruled appellate courts that had reversed jury verdicts for plaintiffs in FELA actions. The appellate courts had reversed on the basis that there was insufficient evidence for the cases to be submitted to the jury. This Court overruled the appellate courts on the ground that where there was any evidence of employer negligence, however slight, the case must be submitted to the jury and that the jury's verdict in such cases must be allowed to stand.

In these decisions this Court did not purport to rule on the burden of proof in an FELA case. It was concerned solely with seeing, in FELA actions, that the case was decided by the jury where there was any evidence of employer negligence. This Court was concerned

with appellate courts invading the function of the jury by deciding, in effect, questions of fact.

As previously indicated, in the *Dennis v. Denver & Rio Grande RR case*, supra, this Court made no mention of a preponderance of the evidence instruction being improper in an FELA action. Clearly this indicates that the decision was not concerned with burden of proof but rather with seeing that the jury was allowed to decide FELA cases in which there was any evidence of employer negligence.

Petitioner is advocating that the jury be instructed to use the same standard in deciding the issues in the case as is employed in determining whether the case should be submitted to the jury in the first place. Such a proposal is illogical. If a jury were instructed that a plaintiff, to recover, need only introduce some evidence on each issue and not a preponderance of evidence, the jury would inevitably find for the plaintiff since the trial judge, in submitting the case to the jury, has already held that there is some evidence on each issue. Such was the thinking of the Oregon Supreme Court (App. 12). There would thus be no need of a jury in an FELA case. The Congress and this Court surely did not intend such a result.

If petitioner's position were adopted, a plaintiff would recover simply by introducing some evidence, however unconvincing and however strongly refuted, on each issue in the case.

The rule requiring proof of an issue by at least a preponderance of the evidence is not merely a rule of law—

it is a rule of logic. It is inexorable and inescapable. While this Court may have permitted a measure of speculation in determining causation under the FELA, it has not altered the fundamental processes of reasoning. By any rational process, each issue must be resolved in accordance with the weight of the evidence, or it cannot be resolved at all. And if the question cannot be resolved—i.e., if there is no preponderance of the evidence—then there is no rational basis for a verdict against the defendant.

The decisional process requires that there be a burden of proof, or risk of non-persuasion, and failure of proof logically requires that the decision go against the party having the burden of proof. If the burden of proof is accepted—and there was no exception to the instruction on burden of proof as such (R 21)—then there must be a standard for determining whether the burden of proof has been met. With no standard a lawsuit would be merely a game of chance or an exercise in prejudice. And the standard of mere preponderance of the evidence is as little a margin as anyone could reasonably ask.

There can be little doubt that the issues in this case were clearly before the jury. An edited version of 45 USC § 51 was read to the jury which clearly stated that the railroad should be held liable for damages for any injury "resulting in whole or in part from the negligence" of the carrier.

The complete instruction was as follows:

> "As you are aware this action is predicated against the defendant for alleged negligence charged by the plaintiff and is brought under and pursuant to

the act known as the Federal Employers' Liability Act, which provides in part as follows:

> " 'Every common carrier by a railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.' " (R 23-24)

That instruction was followed by the instruction:

> "Under this act the defendant is under the continuous duty to exercise ordinary care under all of the circumstances to provide the plaintiff, as its employee, with a reasonably safe place to work and to furnish reasonably safe tools and equipment for such work. And such duty extends to the premises of third parties or persons, if upon which premises the duties of the employee require him to work. This duty imposed upon the defendant under the law is nondelegable. That is to say, the employer cannot delegate or absolve itself of the performance of this duty to any other employer or person, but it adheres to the defendant without the possibility of suspension or interruption." (R 24)

The trial judge in the contested instruction merely stated to the jury that on each of the issues of the case, which had been clearly drawn, the petitioner must prevail by a preponderance of the evidence.

CONCLUSION

The lower courts did not err in approving an instruction to the jury that petitioner, to meet his burden of proof, must establish the issues in the case by a preponderance of the evidence.

The petition should be denied.

Respectfully submitted,

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